

MAY 13 1977

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

* * *

NO. 76-1430

* * *

GIBSON PRODUCTS, INC., OF RICHARDSON,
Petitioner
V.

THE STATE OF TEXAS,

Respondent

* * *

ANSWER TO PETITION FOR A WRIT
OF CERTIORARI

* * *

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May, 1977

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Respondent The State of Texas respectfully prays
that the Writ of Certiorari be in all things denied and for
grounds would respectfully show:

JURISDICTION

Generally, this Court has jurisdiction under Title
28 U.S.C. §1257(3) in that the validity of a statute of the
State of Texas is drawn in question on the ground of its
being repugnant to the Constitution of the United
States. However, as the argument contained in this brief
will show, Petitioner has not brought this case within
the criteria of Rule 19(a) of this Court's rules for the
consideration of an Application for a Writ of Certiorari.
The very question here submitted has been previously
determined by this Court in *McGowan v. State of
Maryland*, 366 U.S. 420 (1961) and *Two Guys from
Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582
(1961).

QUESTION PRESENTED

The only question presented by this record is whether an economic regulation of the State of Texas that certain commodities may not be sold on both Saturday and Sunday is so far outside that wide latitude accorded states in the regulation of their local economies under their police powers that this Court should substitute its judgment for that of the Texas Legislature and declare the statute to have no rational basis.

STATUTES INVOLVED

In its revision of the state's penal code, the Legislature of Texas removed what was Article 286a and transferred it to the civil statutes where it now appears as Article 9001 (Acts 1973, 63rd Legislature, Ch. 399, p. 883, §5) and provides:

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware, kitchen utensils, china, home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items

customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars (\$100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars (\$500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership

or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39 §1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5 Occasional sales of any item named herein by a person not engaged in the business of selling such items shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas¹ are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

STATEMENT OF THE CASE

Respondent cannot agree to the "statement of material facts" found in the Petition for Writ of Certiorari for it is more argumentative than it is

declarative. It does, however, contain the essential facts which are that on December 24, 1975, following a hearing, a state district court enjoined Petitioner from further violations of Article 9001, Vernon's Texas Civil Statutes, by continuing to offer for sale, selling, or compelling, forcing or obligating their employees to sell on the two consecutive days of Saturday and Sunday a list of items taken from Section 1 of Article 9001. Petitioner took a direct appeal to the Supreme Court of Texas, bypassing Texas' intermediate appellate court, by virtue of Rule 499a, Texas Rules of Civil Procedure (Appendix A). By virtue of that rule, such an appeal could present only the constitutionality or unconstitutionality of a statute of the State or the validity or invalidity of an administrative order issued by a state board or commission under a state statute when that question arose by reason of a trial court granting or denying an injunction.

In an opinion which Petitioner criticizes for its brevity (Petition, page 5) the Texas Supreme Court on December 22, 1976 affirmed the judgment of the district court and upheld the constitutionality of the statute. *Gibson Products Company, Inc. v. State*, 545 S.W.2d 128 (Tex. Sup. 1976)

The Texas Supreme Court based its decision in large part upon a long line of prior decisions upholding the constitutionality of the predecessor to Article 9001, stating:

" . . . it has often been upheld as constitutional against the same equal protection and due process arguments as are repeated here. *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex. 1969), dism'd for want of a substantial federal question 397 U.S. 590, 90 S.Ct. 1359, 25 L.Ed.2d 596; Ralph Williams Gulfgate

¹Now repealed by Acts 1973, 63rd Leg., p. 991, ch. 399 §3 (a), enacting the new Texas Penal Code.

Chrysler Plymouth, Inc. v. State, 466 S.W.2d 639 (Tex.Civ.App. 1971, writ ref'd n.r.e.); *Sundaco, Inc. v. State*, 463 S.W.2d 528 (Tex.Civ.App. 1970, writ ref'd n.r.e.); *Levitz Furniture Co. v. State*, 450 S.W.2d 96 (Tex.Civ.App. 1969, writ ref'd n.r.e.)." (545 S.W.2d at 129)

The Supreme Court of Texas denied rehearing on January 19, 1977 and, within ninety days from that date, this Petition for Writ of Certiorari was filed.

ARGUMENT

In stating the question presented, Petitioner specifies four constitutional violations:

(1) violation of the right of a member of the consuming public to shop and buy at will "guaranteed by the due process clause."

(2) arbitrary deprivation of the right of a merchant to pursue his occupation by depriving him of the right to sell certain merchandise on any day when it is legal for him to have his place of business open, guaranteed by the due process clause.

(3) arbitrary discrimination against sellers of tangible products in favor of sellers of services, prohibited by the equal protection clause.

(4) arbitrary discrimination against sellers of certain commodities (socks) in favor of sellers of other commodities (cigarettes, liquor) prohibited by the equal protection clause.

As to the first of these, the issue of the right of a member of the consuming public was not before the court below and is not properly before this Court. Petitioner is not a consumer.

In *McGowan v. State of Maryland*, 366 U.S. 420 (1961), Mr. Chief Justice Warren stated the questions presented to include ". . . whether the classifications within the statutes bring about a denial of equal protection of the law . . ." (366 U.S. at 422) There the statute prohibited the sale of socks, while permitting the sale of cigarettes, confectioneries, milk, bread, etc. The court found the statute constitutional saying:

"The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (Citations omitted)

"It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day - that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will

prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

"The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. (Citations omitted)" (366 U.S. at 425-426)

The greatest latitude is given to the states in adopting police regulations and establishing classifications upon which they depend, so long as there is no suspect classification as, for instance, race or religion. Thus, for instance, in *Dandridge v. Williams*, 397 U.S. 471 (1970), Mr. Justice Stewart, speaking for the majority of the court, said:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because its classifications made by its laws are imperfect. If this classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' 'A statutory discrimination will not be set aside if any state of fact reasonably may be conceived to justify it.' *McGowan v. Maryland*, . . ." (397 U.S. at 485)

Similarly, in *McLaughlin v. State of Florida*, 379 U.S. 184 (1964), Mr. Justice White, speaking for a unanimous court, said:

"Normally, the widest discretion is allowed the legislative judgment in determining

whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classifications as reasonable rather than arbitrary and invidious . . ." (379 U.S. at 191)

In *City of New Orleans v. Dukes*, ____U.S____, 96 S.Ct. 2513 (1976), the court, in a per curiam opinion discussing the validity of the ordinance of the City of New Orleans which discriminated between vendors who had continually operated their businesses for eight years and those who had not, said:

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determination as to the desirability of particular statutory discrimination. [Citations omitted] Unless a classification trammels fundamental personal rights or is drawn upon inherently suspected distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . in local economic fear, it

is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with Fourteenth Amendment" (96 S.Ct. at 2516-2517)

Numerous other cases might be cited but certainly this Court is familiar with the rules which it has applied in the past and should apply here.

The stated purpose of the Legislature of Texas in adopting Article 9001 and its predecessor is "to promote the health, recreation, and welfare of the people of this state." While certainly Petitioner is entitled to believe that there are better ways to serve that purpose than that employed by Article 9001, it cannot be said that the Texas scheme has no rational relationship to the legitimate state purposes.

And, finally, it must be remembered that the Texas statute does not discriminate between merchants. It treats them identically. All merchants, for example, can sell cigarettes or liquor. None can sell socks. No merchant, therefore, is denied equal protection. He is denied due process only if this court can say that constitutionally the State is required to permit all merchants of socks to sell their wares seven days a week.

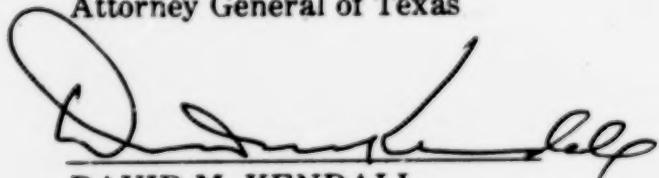
CONCLUSION

In 1961 this Court thoroughly examined the validity of state statutes limiting commercial activities on Saturdays or Sundays. Those decisions have been consistently followed and have established a body of law upon which states have acted and relied. There is nothing about Article 9001 of the Texas statutes which would call for a different rule to be adopted at this time. The statute is a reasonable attempt by the Texas Legislature to curtail mercantile activity to such an extent as to promote the health, recreation and welfare

of the people of the State in general and of those who are employed in mercantile establishments in particular. The State legislatively has stated that Petitioner's employees should not be required to work seven days a week and that, to promote that end, Gibsons should not sell unessential items on seven consecutive days. This is a reasonable regulation having a relationship to the purpose it serves and does not result in any invidious classification. Certiorari should not be granted.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas



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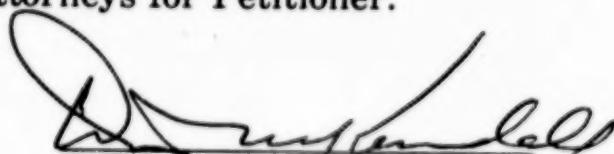
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CERTIFICATE OF SERVICE

I, David M. Kendall, do hereby certify that on this 12 day of May, 1977, a true and correct copy of the above Answer to Petition for a Writ of Certiorari was mailed to Bardwell D. Odum, P.O. Box 38529, Dallas, Texas 75238 and Mr. Leo C. Michaud, 1266 E. Ledbetter, Dallas, Texas 76216, Attorneys for Petitioner.



David M. Kendall

A P P E N D I X A

Rule 499a. Direct Appeals

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as Section 3 b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be

necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943.